IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1089

RKO GENERAL, INC., *Petitioner,*

v.

MULTI-STATE COMMUNICATIONS, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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CITATIONS

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Petitioner RKO General, Inc. respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 4, 1978.

OPINIONS BELOW

The opinion of the court of appeals has not yet been reported. It appears as Appendix A hereto. The opinion of the Federal Communications Commission is reported at 61 F.C.C.2d 1062 (1976), and appears as Appendix B. Its decision denying reconsideration is reported at 64 F.C.C.2d 869 (1977), and appears as

Appendix C. The Partial Initial Decision of the Administrative Law Judge is reported at 61 F.C.C.2d 1070 (1974), and appears as Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1978. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on November 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court of appeals, in unlawful disregard of its reviewing function and in conflict with recent decisions of this Court, exceeded the bounds of judicial review of administrative action (1) by substituting its own fact-finding for the Federal Communications Commission's determination that a bank letter did not provide "reasonable assurance" that an applicant for a permit to construct a television station had the requisite financing, and (2) by ordering the agency to accept the letter as conclusively demonstrating "reasonable assurance" that a loan would be available.

STATUTES INVOLVED

Sections 307(a), 308(b), and 309(a) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 307(a), 308(b), 309(a), and Section 10 of the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. § 706. These statutes appear as Appendix E hereto.

STATEMENT OF THE CASE

An application was filed with the Federal Communications Commission ("FCC" or "Commission") by Respondent, Multi-State Communications, Inc. ("Multi-State"), on May 1, 1972 for a permit to construct a television station on Channel 9, New York City. Its application was mutually exclusive with an application filed by Petitioner, RKO General, Inc. ("RKO"), for renewal of its license for Station WOR-TV, New York City, operating on the same channel. In an attempt to meet the FCC's long-established requirement that an applicant for a new television station demonstrate that it is able to finance the construction and initial operation of the station, Multi-State presented a letter from the Chase Manhattan Bank ("Chase"). The letter stated that Chase was willing to lend Multi-State up to $4 million, but only if certain conditions were met, including all reasonable and ordinary credit criteria of Chase at such time as Multi-State obtains the license to operate the station and requests a formal lending commitment.

The Commission initially accepted the Chase letter as demonstrating "reasonable assurance" of the availability of a $4 million bank loan, subject to a hearing issue on the applicant's ability to meet any collateral requirement. However, when the Chase official who had written the letter gave a deposition which cast doubt on the significance of the letter, an issue was designated in the proceedings to determine the general availability of the $4 million loan to Multi-State.

At the ensuing hearing before an Administrative Law Judge ("ALJ"), the bank official testified that the bank had not yet decided that it was willing to make a $4 million loan to Multi-State. He stated that

such a decision would not be made until after information had been obtained that would enable the bank to determine that Multi-State is credit-worthy. He testified that the bank did not have the information upon which it could give any reasonable assurance that when requested to do so it would make the $4 million loan to Multi-State. He stated further that if Multi-State obtained a license to operate a television station on Channel 9 in New York City, that fact in itself would not suffice to guarantee the credit-worthiness of Multi-State. However, when asked whether the letter was "a viable, subsisting letter which Chase Manhattan now regards as outstanding to Multi-State Communications," he answered in the affirmative.

The ALJ held that although the Chase letter initially had been accepted by the Commission as indicating a present firm intention by Chase to make a $4 million loan and, therefore, constituted "reasonable assurance" that the money would be available to Multi-State, a different conclusion had to be reached in view of the bank official's testimony that Chase had intended merely to express interest in a future loan application from Multi-State. The ALJ held that, although a legally binding commitment is not required by the FCC, a present firm intention by the bank is required, and Multi-State had failed to carry its burden of proving, with the requisite degree of "reasonable assurance," that the bank loan upon which it relied for its financial qualifications was available. Hence, the ALJ concluded, Multi-State had failed to demonstrate that it is financially qualified to construct and operate its proposed station.[1]

[1] RKO General, Inc., 61 F.C.C.2d 1070 (1974) (Partial Initial Decision), Appendix D.

On appeal to the full Commission, the ALJ's decision denying Multi-State's application was affirmed on the basis of the findings and reasoning in that decision and the Commission's own examination of the bank official's testimony.[2] The Commission also denied Multi-State's petition for reconsideration.[3]

The court of appeals reversed, holding that the Commission had erred in construing the bank official's testimony as having modified the initially accepted meaning of the bank letter as a present firm intention to make the loan.[4] The court ordered the Commission to accept the bank letter as constituting reasonable assurance that the loan would be available. One of the members of the three-judge panel dissented.[5] RKO's petition for rehearing and suggestion for rehearing *en banc* were denied. Two judges noted that they favored rehearing *en banc*.

[2] RKO General, Inc., 61 F.C.C.2d 1062 (1976), Appendix B.

[3] RKO General, Inc., 64 F.C.C.2d 869 (1977) (reconsideration), Appendix C. After denying Multi-State's application, the ALJ proceeded to hearing on another issue with respect to RKO's application. Multi-State was allowed to participate in that hearing. The ALJ's Initial Decision in favor of RKO's application was affirmed by the Commission. RKO General, Inc., FCC 78-568, released August 10, 1978. Multi-State's petition for reconsideration of that decision is pending.

[4] Multi-State Communications, Inc. v. FCC, No. 77-1440 (D.C. Cir. Oct. 4, 1978), Appendix A. The jurisdiction of the court of appeals was founded on 47 U.S.C. § 402(b).

[5] The dissenting judge stated that he would remand the case for consideration of a second financial commitment letter presented to the FCC by Multi-State in May, 1977, immediately before the appeal was filed.

REASONS FOR GRANTING THE WRIT

The decision below, which involves an important question of federal administrative law, is in conflict with decisions of this Court. In determining, contrary to the Administrative Law Judge and the Federal Communications Commission, that the letter from Chase Manhattan Bank demonstrated that an applicant for a permit to construct a television station had reasonable assurance of the availability of a $4 million loan, the court of appeals improperly substituted its own evaluation of the evidence for that of the Commission, the administrative agency entrusted by Congress with the responsibility for determining the financial qualifications of broadcast licensees. The court thus disregarded the limitations on judicial review of administrative agencies established by the Administrative Procedure Act and by numerous decisions of this Court.

Under the Communications Act of 1934, as amended, the applicant has the burden of proof to the Commission that it is financially qualified before the agency can grant a broadcast license.[6] Over the years, the Commission has developed standards for establishing the financial qualifications necessary to receive a license. *See Orange Nine, Inc.*, 7 F.C.C.2d 788 (1967). It has allowed applicants to rely on bank loans for their financing if they can demonstrate "reasonable assurance" that such loans are forthcoming. *See Crosby N. Boyd*, 57 F.C.C.2d 475, 488-89 (1976). The determination of whether any particular applicant has demonstrated "reasonable assurance" is of necessity one based on experienced judgment. The Commission's judgment, reiterated with only insignificant word changes in many

[6] 47 U.S.C. § 308(b).

decisions,[7] is that an applicant must show that the bank has a "present firm intention" to make the loan if the applicant's financial qualifications are dependent upon the loan. This Court has held that:

> "Where Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, [the court's] function is limited to determining whether the Commission's decision 'has "warrant in the record" and a reasonable basis in law.'"[8]

Rather than showing deference, however, the court of appeals in this case usurped the Commission's statutory role in deciding whether Multi-State had met the burden which Congress and the Commission had placed on it.

Last term, this Court sharply criticized the D.C. Circuit court for intruding too heavily into agency discretion in rulemaking proceedings. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). This case presents a comparable situation involving an adjudicatory proceeding where the court of appeals has substituted its judgment for that of the agency. Allowing the decision below to stand would counte-

[7] *See, e.g.*, Sinton Broadcasting Co., 38 P&F Radio Reg. 2d 341, 345 (1976); Jay Sadow, 39 F.C.C.2d 808, 810 (Rev. Bd. 1973); Lamar Life Broadcasting Co., 26 F.C.C.2d 932, 934 (Rev. Bd. 1970); John Hutton Corp., 26 F.C.C.2d 711, 712 (Rev. Bd. 1970); Chicagoland TV Co., 11 F.C.C.2d 96, 103-06 (Rev. Bd. 1967); D. H. Overmyer Communications Co., 4 F.C.C.2d 496, 498-500 (Rev. Bd. 1966).

[8] Atlantic Refining Co. v. FTC, 381 U.S. 357, 367 (1965); *see also* SEC v. New England Electric System, 390 U.S. 207, 211 (1968).

nance a major breach of this Court's established standards for agency review.

The standards for judicial review of agency actions are well established. Under the Administrative Procedure Act, the applicable standard varies with the character of the underlying administrative proceeding. Adjudications based on formal hearing records, such as this case, are reviewed under the "substantial evidence" test contained in 5 U.S.C. § 706(2)(E). *See Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 413-15 (1971). In applying the substantial evidence test, this Court has held that reviewing courts should canvass the record to determine whether the evidence relied on by the agency, in light of any contradictory evidence, provides substantial support for the agency's decision. If so, the administrative decision must be affirmed. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 487-88 (1951). The possibility that two inconsistent conclusions could be drawn from the evidence does not permit a reviewing court to substitute its judgment for that of the agency. *Consolo* v. *FMC,* 383 U.S. 607, 620 (1966); *NLRB* v. *Nevada Consolidated Copper Co.,* 316 U.S. 105, 106 (1942).

Although the court of appeals did not articulate the standard which it was using, it embarked upon a *de novo* review of the evidence without citing any supporting authority. It concluded that the evidence before the Commission demonstrated that the Chase letter provided reasonable assurance of Multi-State's being able to obtain financing if it received a license and that "the bank had gone as far as it could go . . . in providing reasonable assurance that a loan would be made,

short of making a legally binding commitment,"[9] notwithstanding the fact that substantial evidence in the record supported the Commission's contrary judgments.

Concerning what further assurances short of a binding commitment the Chase might have given but did not give Multi-State, the following colloquy appears in the record:

> "Q. . . . Now does Chase give letters of intent with respect to a loan which are not legally binding commitments, but which indicate a present intention to make a loan and an indication that if conditions remain the same with respect to the financial worth of the participants and so forth, that the loan would be made in the future? Do you ever make such an indication?
>
> A. A letter of intent to make a loan in the future, yes, sir.
>
> Q. Which is *not* a legally binding commitment?
>
> A. Yes, sir."[10]

Although this testimony directly contradicts the court of appeals' finding, there is no reference to it in the court's opinion. Further, repeated questions to the Chase officer drew the consistent response that no assurance of a loan to Multi-State could be made on the basis of the information which Multi-State had provided to the bank. The ALJ set forth his testimony as follows:[11]

> ". . . Jones was asked:
>
> '. . . whether as of this time, Chase Manhattan or you as an officer of Chase Manhattan have received

[9] Slip Op. at 7, Appendix at 7a.

[10] Tr. 82-83 (emphasis added).

[11] 61 F.C.C.2d at 1072-73, Appendix at 6d-8d.

the information upon the basis of which you could give any reasonable assurance that when requested to do so, you would make a $4,000,000 loan to Multi-State.'

He replied:

'No, sir.'

* * *

'Q. . . . Multi-State Exhibit #1 [the April 18, 1972 bank letter] is not a representation of an intention to make the loan based upon the continuation or the existence of the facts as you know them, or you knew them at the time you wrote the letter?'

'A. No, sir, the time that we are looking forward to to consider it is the time that these conditions are operative [at such time as the FCC may have awarded Multi-State a grant].'

'Q. And, until such time as these conditions become operative, you had made no evaluation as to the credit-worthiness of Multi-State?'

'A. That is correct.'

* * *

'. . . Mr. Jones, is it not true that there must be some further action by the bank on information to be received from Multi-State before you can state with any reasonable assurance that Multi-State will have available a four million dollar loan from the Chase Manhattan Bank?'

He replied:

'Yes.'

He was then asked:

'Now, assuming that Multi-State were today to receive the license to operate Channel 9 in New York, without the information provided by Multi-

State from the sort that you've described previously, you could not even today then, state with reasonable assurance that the Chase Manhattan Bank would be willing to make a four million dollar loan, is that not correct?'

Jones responded:

'That is correct. We would first have to determine the credit-worthiness. . . .' "

Despite this clear and definite testimony, the court of appeals deemed dispositive the fact that the bank official acknowledged that the letter in which he, on behalf of the bank, had expressed a provisional willingness to make the loan, remained "viable." All such acknowledgement meant was that the letter remained in effect in accordance with its terms, including the subsequent condition of credit-worthiness. But, even assuming that this testimony created some doubt concerning the bank's present intention, the record amply supported the Commission's conclusion that the Chase letter nevertheless did not satisfy the reasonable assurance standard. Since there was substantial unambiguous testimony to support the Commission's conclusion, it should have been judicially affirmed even if a different conclusion might also have been reached by a different fact-finder. Instead, the court of appeals, upon only the barest discussion of the evidence, ruled flatly that the Commission's conclusion lacked support and that, to the contrary, Multi-State had demonstrated reasonable assurance of the availability of the loan.[12]

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[12] Viewed from a different perspective, the court of appeals exceeded its proper scope of review under the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A) also, by effectively substituting the court's policy judgment as to the requisite degree of assurance of a bank loan for financial qualification. *See* FCC v.

In ordering the Commission to accept the Chase letter as proof that a bank loan is reasonably assured, the court further overstepped its review function. It is settled law that courts of appeals are restricted to identifying agency errors and cannot themselves make judgments that are entrusted to an agency. As this Court held in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940), a reviewing court may

> "correct errors of law and on remand the Commission is bound to act upon the correction. . . . But an administrative determination in which is embedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge."

The Commission found that since Chase had never analyzed the financial status of Multi-State and had never determined its credit-worthiness but instead had deferred any appraisal of those factors until after receipt of a construction permit by Multi-State, the bank had not done enough for the Commission to infer any reasonable assurance of the availability of the loan. In ruling that the Commission must hold that the loan would be available to Multi-State notwithstanding the bank's reservations, the court of appeals in effect has forbidden the Commission from requiring applicants

National Citizens Committee for Broadcasting, *supra*, 436 U.S. at 802-03. Since the Commission articulated the relevant factors behind its decision, including its definition of "reasonable assurance," and its result was rationally connected to the facts it found, no grounds exist for reversing the Commission under this standard. *See* Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285-86 (1974); Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

to demonstrate their financial qualifications prior to receiving a construction permit. This is contrary to the requirement of the Communications Act that the Commission find applicants financially qualified *before* granting their applications.[13]

The effect of the court of appeals' disregard of limitations on its role is to make it the decisionmaker, rather than the FCC which Congress entrusted with the responsibility for enforcing the Communications Act. The plain error in the court of appeals' decision is identical to the same court's error that occasioned review in *Consolo* v. *FMC, supra,* and arises from the same interventionist spirit that was present in *FCC* v. *National Citizens Committee for Broadcasting, supra,* and *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc., supra.* Therefore, this Court's review is required .

[13] The Commission will not make a grant to an applicant on the basis of a comparative evaluation of its qualifications against competing applicants, unless the applicant has met its burden of establishing its financial qualifications. This finding by the Commission is required by Sections 307(a), 308(b), and 309(a) of the Communications Act, 47 U.S.C. §§ 307(a), 308(b), 309(a), and the court of appeals has previously recognized that financial and other basic qualifications must be determined before a grant may be made. *See* Johnston Broadcasting Co. v. FCC, 85 U.S. App. D.C. 40, 45-46, 175 F.2d 351, 356-57 (1949).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 8, 1979

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1440

MULTI-STATE COMMUNICATIONS, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

RKO GENERAL, INC., INTERVENOR

Appeal from an Order of the
Federal Communications Commission

Argued June 20, 1978

Decided October 4, 1978

Joseph M. Morrissey, for appellant.

Thomas R. King, Jr., counsel, Federal Communications Commission with whom *Robert R. Bruce*, General Counsel, and *Daniel M. Armstrong*, Associate General Counsel were on the brief, for appellee.

Harold David Cohen, J. Laurent Scharff and *Jack N. Goodman* were on the brief, for intervenor.

Before: BAZELON, *Circuit Judge*, and TUTTLE,* *United States Senior Circuit Judge* for the Fifth Circuit, and MCGOWAN, *Circuit Judge*

Opinion for the Court filed by *Senior Circuit Judge* TUTTLE.

Dissenting opinion filed by *Circuit Judge* BAZELON.

TUTTLE, *Circuit Judge*: This is an appeal from an order of the Federal Communications Commission (FCC) denying the application of the petitioner, Multi-State Communications, Inc., to construct a commercial broadcast television station in New York City. The Commission found that the petitioner was not financially qualified, as required by § 308(b) of the Communications Act (47 U.S.C. § 308(b)), because it had not presented reasonable assurance that a $4 million bank loan would be available to finance construction and operation of the station.

Multi-State filed its application with the FCC on May 1, 1972. Accompanying this application was a Chase Manhattan Bank letter signed by Kaye H. Jones, a vice president of the bank. The letter was intended by Multi-State to demonstrate that it fulfilled FCC requirements of financial qualification, namely that it had funds available to construct the station and to operate it for three months without relying on revenue.[1] The bank letter stated in its entirety:

> We are willing to lend you up to $4,000,000 provided the following conditions are met:

---

* Sitting by designation pursuant to 28 U.S.C. § 291(a).

[1] This is the standard enunciated by the Commission in *Orange Nine, Inc.*, 7 FCC 2d 788 (1967).

> (1) You are successful in obtaining approval from the Federal Communications Commission to construct and operate a television broadcast station on VHF Channel 9 in New York City; and,
>
> (2) All reasonable and ordinary credit criteria of the Chase Manhattan Bank are met at such time as you (a) have received the license to operate said station; and (b) request from the Chase Manhattan Bank a formal lending commitment.
>
> While the pricing and terms of amortization of any loan commitment will of course be contingent upon the exact credit conditions prevailing at the time of such commitment, we contemplate calculating interest on any loan made at the rate of 2% above the prime rate of this bank at the time of each advance (for information, the prime rate of this bank is presently 5%); and, any loan made will be repaid, after a one year moratorium on principal repayment as necessary, in eight equal semi-annual installments or as otherwise reasonable in line with financial projections received prior to the time of borrowing.
>
> This bank is personally and favorably acquainted with several of the stockholders listed in your application to the Federal Communications Commission. As a condition of our intent to finance Multi-State Communications, Inc., we are depending on the continued participation in your venture of substantially all of the stockholders named in your application or substitute stockholders which are acceptable to the Chase Manhattan Bank.

The incumbent licensee, RKO General, Inc., intervenor here, had also applied for renewal of its license. Because RKO's and Multi-State's applications were mutually exclusive, they were set for a consolidated hearing at which several issues were designated to be aired. In its order designating issues the FCC stated that "Multi-State has

established the availability of the $4,000,000 bank loan from the Chase Manhattan Bank." However, because the letter was silent on the question of collateral, one of the issues set for hearing was to determine whether Chase Manhattan would require collateral and whether Multi-State could comply with any such requirement.

Subsequent to the designation of issues and before the hearing, RKO was permitted to depose Jones, the author of the bank letter upon which Multi-State relied. On the basis of the contents of this deposition, the FCC Review Board added an issue:

> To determine whether Multi-State Communications, Inc. will have available a $4,000,000 loan to finance its construction and first three months' operating expenses, and, in light thereof, whether Multi-State Communications, Inc. is financially qualified.

Because the presiding administrative law judge felt that the resolution of this issue was likely to be dispositive of Multi-State's application, he ordered the single issue to be heard before the other designated issues.[2] The hearing consisted mainly of Jones' testimony. On the basis of that testimony, the administrative law judge concluded that Multi-State had failed to carry its burden of proving that there was reasonable assurance that the bank loan would be available. Because the loan was an essential part of Multi-State's proposed financing, the ALJ held that the absence of the loan rendered Multi-State financially disqualified. The findings and conclusions of the ALJ were subsequently affirmed by the

[2] On appeal Multi-State asserts that the isolation of one issue for hearing and decision in advance of the others violated its statutory right to due process. Our resolution of the substantive issue makes it unnecessary for us to consider this and another procedural issue.

FCC[3] and this appeal followed. After carefully scrutinizing Jones' testimony and the remainder of the evidence, we are of the opinion that the record evidence does not support the Commission's holding that Multi-State had failed to establish its financial qualifications to be a licensee. Consequently we reverse and remand for further proceedings in which the petitioner is not regarded as disqualified for financial reasons on the basis of the unavailability of the loan.

It is clear that the administrative law judge based his findings of lack of qualification on Jones' testimony. These findings were adopted by the Commission and formed the basis for the Commission's dismissal of Multi-State's application. Close scrutiny of that testimony reveals, however, that Jones did not state that the letter of intent was no longer operative in accordance with its terms. In fact, when asked if this was "a viable, subsisting letter which Chase Manhattan now regards as outstanding to Multi-State Communications," Jones responded, "Yes, sir." Jones did testify that the bank did not consider the letter a final and binding commitment in the sense that the bank was legally obligated to make the loan under any and all circumstances, but the Commission concedes that it does not require a legally binding commitment. A "reasonable assurance" that the loan will be available is all that the Commission requires.

The testimony of Jones also established that the letter did not represent an intention to make a loan based upon the continuation of the existence of facts as they existed at the time of the letter. The Commission construed this portion of the testimony as an indication that the letter

[3] The Commission ordered the presiding judge to resume hearings on the issues relating to RKO's renewal application. These hearings have now been held and an initial decision granting the renewal application for RKO has been issued. The matter is now pending before the Commission.

was devoid of significance. However, this conclusion ignores Jones' testimony that the final decision on the loan could not be made in advance because the bank was precisely interested in the situation as it would exist at the time that Multi-State received the grant from the Commission to operate the station. Obviously, then, the bank's present lack of information about certain aspects of Multi-State's "credit-worthiness" does not undercut the import of the letter. When Multi-State's attorney asked Jones whether "[i]t would be an exercise in futility . . . to assemble materials of the sort indicated here, when such materials might be entirely passe and outdated many months in the future at such time as the condition in here is met, namely a grant to Multi-State," Jones responded: "We look at the situation as of a specific point in time, when we are putting up the money, yes, sir." Nor is it of crucial importance that further actions remained to be taken by the bank before the loan would be finalized. For if the need for additional information and further action could be said to render the bank letter worthless, then the Commission has in essence required a legally binding commitment at the same time that it professes to require something less.

The letter did not purport to be a legally binding loan commitment and Jones' testimony made this clear. Consequently, he testified that he did "not wish to start defining a loan proposition that would take place in the future that was not a commitment that would start taking on the aspects of a commitment." For this reason, he had been unwilling previously to alter the letter to include a provision for collateral. Yet he insisted that the bank stood upon the letter as written, that all of the conditions affecting the loan were contained within the four corners of the letter, and that "the time that we are looking forward to to consider it [is] the time that these conditions are operative." By the terms of the letter, the conditions do not become operative until the

grant of the license, at which time Multi-State is to request a formal lending commitment and meet "[a]ll reasonable and ordinary credit criteria" of the bank.

We construe Jones' testimony as establishing that the bank had gone as far as it could under the circumstances in providing reasonable assurance that the loan would be made, short of making a legally binding loan commitment. Jones expressed the bank's continuing willingness to lend up to $4 million, as stated in the first sentence of the letter. It is common business practice for transactions to proceed on just this type of letter.

The Chase bank letter was initially accepted by the Commission as indicating a present firm intention to make the loan. The administrative law judge's initial decision acknowledges this fact. It was only the erroneous belief that Jones' testimony somehow modified the meaning of the letter that led the judge and then the Commission to alter this belief. Indeed, no one contends that the letter on its face is inadequate by the Commission's standards to constitute proof of financial qualification. Because we hold that the Commission erred in construing the import of Jones' testimony, that letter should have been accepted by the Commission as satisfying its requirement of reasonable assurance that the loan would be available.

Reversed and remanded.

BAZELON, *Circuit Judge, dissenting*: I would remand the case for consideration of a second financial commitment presented to the FCC by Multi-State in May, 1977. Although produced late in the proceeding, the second commitment was submitted before the Commission's order was final.[1] This court has recognized that such late presentations, when changing a "core" circumstance of the case and when supported by equitable considerations, can be accepted by the FCC without disturbing the value of administrative finality.[2] A second commitment would clearly affect the core circumstances of the case. Moreover, the issues raised by Multi-State's appeal were substantial, as the majority decision today demonstrates, and the difficulties of acquiring a second financial commitment were also substantial.[3] Accordingly, I cannot say that Multi-State's delay in obtaining the second commitment bars its consideration.

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[1] The FCC order was under judicial review at the time the Commission confronted the second financial commitment, RKO General, Inc., FCC 78-96 (Feb. 22, 1978). *See* Greater Boston Television Corp. v. FCC, 463 F.2d 268, 282 (D.C.Cir. 1971), *cert. denied sub nom.* WHDH, Inc. v. FCC, 406 U.S. 950 (1972).

[2] Crosthwait v. FCC, No. 76-1196 (D.C.Cir. Aug. 29, 1978), slip op. at 8-9, 10-12; La Rose v. FCC, 225 F.2d 523 (D.C.Cir. 1955); Greater Boston Television Corp. v. FCC, *supra* at 283.

[3] Additional factors appear in the background of this case which may not, by themselves, mandate a remand, but which touch directly on the question of fairness to Multi-State. RKO General, the incumbent licensee, was a major customer of Chase Manhattan. This potential conflict of interest shadows the bank officer's failure to review the creditworthiness of Multi-State before issuing the letter, and his subsequent testimony on the matter.

APPENDIX B

(61 F.C.C.2d 1062)

F.C.C. 76-1020

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of

RKO GENERAL, INC. (WOR-TV), NEW YORK, NEW YORK
For Renewal of Broadcast License

Docket No. 19991
File No. BRCT-71

MULTI-STATE COMMUNICATIONS, INC., NEW YORK, NEW YORK
For Construction Permit for New Television
Broadcast Station

Docket No. 19992
File No. BPCT-4527

Appearances

Thomas N. Dowd, James J. Freeman and Leon J. Schachter (Pierson, Ball and Dowd) on behalf of RKO General, Inc.; *Joseph M. Morrissey* (Welch and Morgan) on behalf of Multi-State Communications, Inc.; and *P. W. Valicenti, Charles W. Kelley and Eric S. Kravetz* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted: November 4, 1976; Released: November 17, 1976)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; HOOKS, QUELLO, AND FOGARTY CONCURRING IN THE RESULT; COMMISSIONER WHITE NOT PARTICIPATING.

1. This proceeding involves the applications of RKO General, Inc. (RKO) for renewal of license of WOR-TV,

New York, New York, and of Multi-State Communications, Inc. (Multi-State) for a new television station employing the same facilities. After these applications were designated for consolidated hearing, the Review Board added, among others, the following hearing issue against Multi-State:

> (1) To determine whether Multi-State will have available a $4,000,000 bank loan to finance its construction and first three months operating expenses, and, in light thereof, whether Multi-State is financially qualified. [48 FCC 2d 397]

Shortly thereafter, the presiding Administrative Law Judge (ALJ) assigned to the case ordered an accelerated hearing on that issue in advance of hearing on the other designated issues (FCC 74M-1037, released August 22, 1974). Multi-State objected to the bifurcated hearing procedure and appealed the ALJ's order. By Memorandum Opinion and Order, 48 FCC 2d 826, released September 6, 1974, the Review Board denied Multi-State's appeal, stating that the order in which the evidence shall be taken in the proceeding is within the Presiding Judge's discretion.[1]

2. Upon completion of the hearing on the loan availability issue, RKO then moved for summary decision adverse to Multi-State. By Memorandum Opinion and Order, FCC 74M-1479, released November 13, 1974, the ALJ denied RKO's motion and ordered the parties to file proposed findings of fact and conclusions of law with respect to the already tried loan availability issue. Thereafter, in a Partial Initial Decision (FCC 74D-63, released December 18, 1974), the ALJ held that Multi-State had not sustained its burden

[1] The Review Board refused to rule on Multi-State's contention that the ALJ contemplated the issuance of a summary decision on the ground it would not speculate on what the ALJ might do and no appealable action was before the Board. The Commission denied review. FCC 74-1313, released December 6, 1974.

of proving a "reasonable assurance" that the $4,000,000 bank loan is actually available; that, consequently, it was financially unqualified to construct and operate its proposed facilities; and that its application must therefore be denied.

3. As a result of the foregoing, we now have before us: (a) comments of the Broadcast Bureau (Bureau) on the Partial Initial Decision filed January 7, 1975; (b) exceptions to the Partial Initial Decision, brief in support thereof, and request for oral argument filed by Multi-State on January 17, 1975; (c) the Bureau's reply to Multi-State's exceptions filed on January 30, 1975; (d) RKO's reply to Multi-State's exceptions and to the Bureau's comments filed on January 30, 1975; and (e) RKO's request for oral argument filed on January 31, 1975. Briefly stated, these pleadings ask us to resolve two questions:

> (1) Procedurally, whether the ALJ had the authority to render a decision disqualifying Multi-State following the submission of evidence on but one of the numerous hearing issues specified against the applicant; and
>
> (2) Substantively, whether the record supports the ALJ's determination that Multi-State has failed to show reasonable assurances that it will be able to obtain a $4,000,000 bank loan.[2]

4. A bifurcated hearing procedure which disposes of only some of the designated issues should not be undertaken by a presiding judge without prior Commission authorization. As we specifically stated in our *Report and Order* adopting the summary decision rules, the question of whether the

[2] Multi-State and the Bureau take the position that the ALJ erred procedurally, whereas RKO contends otherwise. As to whether the record will support the ALJ's determination to disqualify Multi-State, RKO and the Bureau argue that it will and Multi-State contends otherwise.

presiding judge should issue a ruling after the adduction of evidence on a dispositive issue before taking evidence on other designated issues "is properly resolved when the proceeding is designated for hearing, at which point the Commission will determine whether to order a separate hearing on the dispositive issue or a full hearing on all issues, and will phrase the issues accordingly." (*Summary Decision Procedures,* 34 FCC 2d 485 at page 490, para. 12). Where several issues are designated for hearing, the better procedure, and the one which conforms to established Commission policy, is for the presiding judge to take evidence and to make findings of fact and conclusions of law as to all issues in order to prevent needless remands. *Alkima Broadcasting Company,* 30 FCC 932 at page 933, n. 2; *Sayger Broadcasting Company,* 32 FCC 493 at page 496, n. 7.

5. Even where we have authorized the resolution of a dispositive issue before acting on other designated issues, we have warned that the procedure "is not one to be employed indiscriminately and without careful consideration of the particular circumstances which weigh for and against it." *Courier-Times, Inc.,* 25 FCC 20, at page 24 (1958). We find to be particularly inadvisable the adoption of a bifurcated hearing procedure in a comparative proceeding not only because a remand might have a disruptive effect on the pending hearing as to other applicants, but also because of the increased likelihood of a multiplicity of judicial review proceedings. Thus, in the case under consideration, an adverse decision against Multi-State is appealable to the courts and the final decision disposing of the competing application will likewise be appealable. *Post-Newsweek Stations of Florida, Inc.,* 46 FCC 2d 647 (1974) and the other cases cited by RKO in support of the procedure followed by the ALJ are not apposite to the question herein presented. These cases merely restate the Commission's long standing policy that there is no need to consider general comparative issues when one of the mutually exclusive

applicants is found to be disqualified. However, unlike the instant case, a full and complete record under all of the specified issues was compiled in those proceedings. For the reasons stated herein, we are persuaded that a hearing should be held on all issues, even though one may be dispositive, and the initial decision should contain findings, conclusions and a resolution of all designated issues unless prior Commission authorization is obtained.[3]

6. Despite the fact that a remand to the ALJ would be consistent with prior Commission policy, we find that special circumstances exist which justify our retention of the proceeding and a disposition of the Partial Initial Decision on the merits. The evidentiary hearing on the issue concerning Multi-State's financial qualifications has been completed. A full discussion of the evidence is contained in the Partial Initial Decision and all parties have filed pleadings directed to the findings and conclusions set forth therein. If the ALJ's determination that Multi-State is financially unqualified is sound, the further hearings under the remaining basic and comparative issues respecting Multi-State's application would neither serve the public interest nor the efficient dispatch of this case.[4]

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[3] We recognize, of course, that Section 1.251 of our Rules provides for the issuance of a summary decision of a dispositive issue despite the designation of other issues. However, the Rule has no application after commencement of the evidentiary hearing.

[4] We reject Multi-State's contentions that it is legally entitled to a full hearing upon all of the specified issues. In *Citizens Communications Center* v. *FCC,* 447 F.2d 1201 (D.C. Cir. 1971), the Court pointed out that there is a clear distinction between the right of qualified applicants to a full hearing on the issues and the lack of any such right for unqualified applicants. *Cf.* also *Deep South Broadcasting Company* v. *FCC,* 278 F.2d 264 (D.C. Cir. 1960), wherein the Court stated that an agency like a court need not decide questions which are not relevant to its decision.

7. Accordingly, we have reviewed the ALJ's decision in light of the record, exceptions, and briefs.[5] Based upon that review, we conclude the ALJ's findings and conclusions have ample record support and they are adopted except as they may be modified by our Decision herein and our rulings on exceptions set forth in the Appendix. In arguing that the ALJ erred in holding Multi-State was not financially qualified, the applicant places considerable emphasis upon the fact that it had obtained a bank letter from the Chase Manhattan Bank.[6] However, the critical question is not whether Multi-State is in possession of a bank letter but whether a reasonable assurance had been demonstrated that a bank loan in the sum of $4,000,000 will be available to finance the construction and operation of the proposed facility. In resolving that question adversely to Multi-State, the ALJ relied primarily upon the testimony of the Vice-President of Chase Manhattan Bank, Kaye Harding Jones, who signed the letter.

8. The pertinent testimony of Mr. Jones is quoted in considerable detail in the Partial Initial Decision (paras. 9 through 16) and, consequently, no purpose would be served by again doing so here. We have examined his testimony, however, and on the basis of that examination we are persuaded, in agreement with the ALJ, that no reasonable

[5] Since the pleadings and exceptions adequately apprise us of the contentions of the parties and the considerations pertinent thereto, we do not believe that oral argument would significantly contribute to a resolution of the issues now presented in this case.

[6] The provisions of the bank letter are quoted in full in the Partial Initial Decision, para. 2. It is particularly significant to note, however, that one condition specified as a prerequisite to the $4,000,000 loan is as follows:

> All reasonable and ordinary credit criteria of the Chase Manhattan Bank are met at such time as you (a) have received the license to operate said station; and (b) request from the Chase Manhattan Bank a formal lending commitment.

assurance of the availability of a $4,000,000 loan has been demonstrated. On the contrary the evidence establishes that Chase Manhattan had not received from Multi-State information essential to enable the Bank to give such reasonable assurance when the bank letter was issued and had not received such information at the time of the hearing (Partial I.D. paras. 11, 14 and 15). The testimony of Mr. Jones further establishes that neither at the time of the issuance of the bank letter nor at the time of the hearing had Chase Manhattan made a determination that the loan would be made (Partial I.D. para. 10); that an evaluation of Multi-State's credit-worthiness would not be made until the applicant is awarded a construction permit (Partial I.D. para. 12); and that no determination would be made by the Bank as to its willingness to make the $4,000,000 loan until Multi-State's application is granted and its credit-worthiness has been established (Partial I.D. para. 13).

9. Upon the basis of Mr. Jones' testimony, which explained and clarified the purpose and intent of the bank letter, and other matters of record, the ALJ held that Chase Manhattan "has never regarded itself as being legally, morally, or as a matter of business practice committed in any way to making the loan," (Partial I.D. para. 21); but that "it has only expressed interest in a future loan application" (Partial I.D. para. 22). The ALJ therefore concluded that "there is absolutely no ground for any belief by either Multi-State or the Commission that there is any assurance, reasonable or otherwise, that the loan will actually be made" (Partial I.D. para. 23); and that "the applicant is not financially qualified to construct and operate its proposed station" (Partial I.D. para. 24). We have considered all of Multi-State's contentions,[7] but we

[7] These contentions have been also considered and discussed in greater detail in our rulings on Multi-State's exceptions contained in the Appendix attached hereto.

find no sufficient basis for disturbing the ALJ's findings and conclusions, and his ultimate conclusion that the public interest would not be served by a grant of Multi-State's application. Such findings and conclusions are therefore affirmed.

10. In view of our action herein, the only material issues remaining to be heard in this case are those concerning the qualifications of RKO for renewal of license. Further proceedings on that application were suspended by the presiding judge pending our disposition of the Partial Initial Decision. Since that Decision has been affirmed, the presiding judge should now proceed with hearings on the issues directed to RKO's renewal application. Although Multi-State's application is denied, it will nevertheless be permitted to retain its party status in this docketed proceeding.

11. ACCORDINGLY, IT IS ORDERED, That the requests for oral argument by Multi-State Communications, Inc., and RKO General, Inc., ARE DENIED.

12. IT IS FURTHER ORDERED, That the application of Multi-State Communications, Inc., for construction permit (BPCT-4527) IS DENIED; and that Multi-State Communications, Inc. IS AUTHORIZED to continue as a party to this proceeding on the issues directed to the license renewal application of RKO General, Inc. for Station WOR-TV at New York, New York.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Rulings on Exceptions of Multi-State Communications, Inc.

1a ..... *Denied.* The requested findings are not decisionally significant. The Commission's ultimate concern is not whether Multi-State's bank letter

conforms to the terms of bank letters submitted by other applicants, but whether the Chase Manhattan Bank intends to lend $4,000,000 to Multi-State in the event its application is granted.

1b, 2b, 22h, 23b ..... *Denied* as decisionally insignificant. It is the bank's intent to make the loan that is questioned, not its ability to do so. In regard to the "validity" of the loan letter, while it might be termed "valid" in the sense that it has not been disavowed, the testimony of the bank officer who signed the letter clearly establishes that the letter represents a mere expression of interest by the bank in making the loan. See Partial I.D. paras. 9-16.

2a ..... *Denied.* The requested finding is redundant. Paragraph 7 of the Partial I.D. reflects, in substance, the matters to which this exception refers.

3a, 3c, 12, 29 ..... *Denied* as decisionally insignificant. There is no dispute that a legally binding loan commitment was neither sought nor given. The presiding judge acknowledged that the Commission does not require loan commitments to be legally binding. See para. 18 and n. 3 of Partial I.D. What is required is a firm commitment—an assurance that the lender is willing to lend the amount specified and firmly intends to do so. *Theodore Granik,* 8 FCC 2d 1068 (Rev. Bd. 1967). It is clear from the testimony of Mr. Jones that the bank has not made any firm loan commitment to Multi-State.

3b, 22c ... *Denied* as decisionally insignificant. The involvement of other officers of the Chase Manhattan Bank in preparing the letter has not been shown to be of any material significance. Only Mr. Jones testified, and there is no reason to suppose that if the others had been called they would have contradicted his testimony in any respect.

4, 15, 16 .. *Denied.* The requested findings are contrary to the evidence. From the terms of the letter itself and the testimony of Mr. Jones, it is apparent that the bank would not make the loan until it had examined Multi-State's financial status and found it credit-worthy. See Partial I.D. paras. 13 and 14.

5, 6, 8, 13, 14 ..... *Denied* as decisionally insignificant. While Mr. Jones testified that the bank had done some preliminary investigation of Multi-State's stockholders, he also testified it had not analyzed its financial status and had not obtained sufficient information to determine whether Multi-State is credit-worthy. (Tr. 77, 78). Whether or not the bank proposes to defer further investigation pending the outcome of this proceeding, the fact remains that the bank never satisfied itself as to Multi-State's ability to repay the loan, and its intent to lend is contingent upon such a determination. This situation is to be distinguished from that wherein the lender determines that the applicant is credit-worthy and agrees to lend absent some adverse change in the applicant's financial condition. As the Chase Manhattan Bank has never evaluated Multi-State's ability to repay the proposed loan, there is no assurance it would find

Multi-State's existing financial condition satisfactory, let alone its financial condition at the time of grant. See Partial I.D. paras. 13 and 14; *Cf. Post-Newsweek Stations of Florida, Inc.*, 46 FCC 2d 647, 651 (1974).

7, 9 ..... *Denied* as decisionally insignificant. There is no reason to suppose Mr. Jones would have testified differently had he conferred beforehand with counsel for Multi-State. Our understanding of the term "credit-worthy" is the same as that of Mr. Jones: Mr. Jones explained that a credit-worthy customer is one whom a prudent lender may reasonably expect will repay a loan according to the terms and time specified. (Tr. 89, 90). There is no indication that Mr. Jones used the term "reasonable assurance" to mean anything other than in its ordinary sense. In any event, regardless of Mr. Jones' understanding of "reasonable assurance," the evidence establishes that Multi-State has no "reasonable assurance"—as the Commission defines that term—of obtaining the bank loan in question. See the ruling on Exception 24 *et seq.*

10, 11 .... *Denied.* The requested findings are superfluous. The bank letter is quoted in its entirety in the second paragraph of the Partial I.D.

17a, 21 ... *Denied* as contrary to the record evidence. The condition set forth in the letter that "all reasonable and ordinary credit criteria . . . [be] met" is vague and subject to misinterpretation. It is necessary to refer to the testimony of Mr. Jones, the letter's author, in order to grasp the significance of this term: Mr. Jones explained that what was meant was that the bank would have to determine that Multi-State was credit-

worthy and would repay the loan upon agreed terms. Mr. Jones added that the bank had not made such a determination. See Tr. 89 and 90, and Partial I.D. paras. 10, 13, and 15.

17b ..... *Denied.* The finding requested in the first sentence of this exception is not supported by a citation to the record as required by Section 1.277(a) of the Rules. The language quoted in the second sentence is not that of Mr. Jones but of counsel for Multi-State. In his prior response Mr. Jones clearly stated that the bank's intention to lend was conditioned on a determination that Multi-State was credit-worthy and upon "the condition of the money markets."

18, 22a ... *Denied.* That the Chase Manhattan Bank investigated Multi-State's stockholders is not decisionally significant in light of Mr. Jones' testimony that the bank has not obtained sufficient information to determine if Multi-State is credit-worthy. See Partial I.D. paras. 11, 13 and 15.

19 ..... *Denied* as contrary to the record evidence. Mr. Jones testified that an analysis of Multi-State's credit-worthiness would involve, *inter alia,* an examination of cash flow statements. (Tr. 77).

20, 22d ... *Denied* as decisionally insignificant. There is nothing in the record to indicate the Chase Manhattan Bank would rely upon the financial condition of Channel 9 under the existing licensee in order to determine the credit-worthiness of Multi-State.

22e ..... *Denied.* The requested finding is contrary to the evidence. See Partial I.D. paras. 11, 13, and 15.

22b ..... *Denied.* The requested finding does not accurately reflect the testimony cited. Mr. Jones did not state that he had "checked out" Multi-State's finances, but that he would have to ascertain whether further dealings with Multi-State would pose a conflict of interests problem for the bank in view of RKO's prior status as a bank customer. (Tr. 60).

22f ..... *Denied* as decisionally insignificant. Whether Multi-State's financial condition has or has not deteriorated is irrelevant in the absence of any initial determination by the bank that Multi-State is or was credit-worthy. See Partial I.D. paras. 10, 11, 13, and 15.

22g ..... *Denied.* The requested findings are contrary to the evidence. See rulings on Exceptions 5 and 20.

23a ..... *Denied* as redundant. See para. 19 of the Partial I.D.

24, 25, 27,
28, 31 .... *Denied.* Multi-State has not satisfied its burden of proof under the loan availability issue. If the loan is to be obtained from a bank or other lending institution, as in this case, we have accepted as a *prima facie* showing of "reasonable assurance" a letter from the lender demonstrating a firm commitment to make the loan. *Post Newsweek Stations of Florida, Inc.,* 46 FCC 2d 647 (1974). In order to establish a firm commitment, the applicant must present evidence of the bank's willingness and intent to make the loan, but need not obtain a contractually binding commitment. Although the Chase Manhattan Bank letter appeared to demonstrate a willingness to lend Multi-State $4,000,000,

Jones' deposition called into question the bank's actual intent, necessitating the Review Board's addition of the present issue. Consequently, it is necessary to look beyond the "four corners" of the letter in order to ascertain the intent. Upon examination of the record as a whole, the Judge correctly concluded the term in the letter that "all reasonable and ordinary credit criteria must be met" was not a *pro forma* reservation, but indicated, rather, that a decision to make the loan would not be reached until the bank had analyzed Multi-State's finances and had determined that it was credit-worthy. The record establishes that the bank has never made such a determination. Further, the Judge found the bank lacked essential financial information that would enable it to render a decision on Multi-State's credit-worthiness. See Partial I.D. paras. 12, 13 and 15. At the close of the hearing, the parties were afforded an opportunity to submit further evidence concerning the loan availability issue, but Multi-State chose to rely upon the existing record. (FCC 74M-1479, released November 13, 1974.) The Judge properly determined based on the evidence, that while the Chase Manhattan Bank may be willing to consider making a loan to Multi-State in the future, it lacked any "present firm intention" of lending the requested funds. Therefore, the Judge correctly concluded that Multi-State failed to establish the availability of the loan and is thus financially unqualified. See Partial I.D. paras. 21, 22 and 23.

26 ..... *Denied* as redundant. See Partial I.D. para. 18.

30 ..... *Denied.* The presiding judge's interpretation of precedent is correct. In *Chicagoland TV Co.*, 11 FCC 2d 96 (Rev. Bd. 1967) and the present

case, testimony of a bank officer established that a determination had not been made which, according to the terms of the loan letter was required before the bank would decide to lend the funds in question. In *Chicagoland* that determination involved the value of certain collateral; in this case the essential requirement is that "all reasonable and ordinary credit criteria of the Chase Manhattan Bank are met." According to Mr. Jones, this requirement meant examining Multi-State's credit-worthiness and finding it satisfactory.

32, unnumbered General Exception *Denied.* While we agree that the better procedure would have been for the presiding judge to have taken evidence on, and resolved, all issues, we believe that special circumstances exist here which justify our now taking jurisdiction of the proceeding and resolving the financial qualifications issue.

33 ..... *Denied.* The Judge's conclusion complained of is supported by and properly reflects the record evidence.

APPENDIX C

(64 F.C.C.2d 869)

F.C.C. 77-246

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of

RKO GENERAL, INC. (WOR-TV), NEW YORK, NEW YORK
For Renewal of Broadcast License

Docket No. 19991
File No. BRCT-71

MULTI-STATE COMMUNICATIONS, INC., NEW YORK, NEW YORK
For Construction Permit For New Television
Broadcast Station

Docket No. 19992
File No. BPCT-4527

MEMORANDUM OPINION AND ORDER

(Adopted: April 5, 1977; Released: April 12, 1977)

BY THE COMMISSION: COMMISSIONER HOOKS CONCURRING IN THE RESULT; COMMISSIONER WASHBURN NOT PARTICIPATING.

1. We have before us a petition filed by Multi-State Communications, Inc. (Multi-State) on December 17, 1976 for reconsideration of our Decision (FCC 76-1020, 61 FCC 2d 1062, released November 17, 1976) denying Multi-State's application for a construction permit for a new television broadcast station to be operated on Channel 9 at New York, New York. Oppositions were filed by RKO General, Inc.,

and the Broadcast Bureau on December 30, 1976, and Multi-State filed a reply thereto on January 11, 1977.[1]

2. In our Decision, we concluded that Multi-State was financially unqualified to construct and to operate its proposed facility because it had failed to demonstrate reasonable assurance it would obtain a $4,000,000 loan from the Chase Manhattan Bank (Bank). In reaching that conclusion, we relied primarily upon the testimony of a vice-president of the Bank, Mr. Kaye Harding Jones, who had signed the Bank's letter to Multi-State. The testimony of Mr. Jones established that the Bank had made no evaluation of Multi-State's credit-worthiness, that it would not do so until Multi-State's application for a construction permit was granted, and that no determination concerning its willingness to loan the money would be made until Multi-State's credit-worthiness is established.

3. Multi-State asserts in its petition for reconsideration that the Commission's and the Administrative Law Judge's decisions were grounded upon incomplete facts. It alleges that at a meeting on December 1, 1976 attended by Multi-State's president, Mr. Charles O. Blaisdell, a senior vice-president of the Bank, Mr. John C. Archibald, and Mr. Jones, Multi-State first "learned of the extent and duration of Jones' hostile behavior, and to a degree, the reason or reasons for it." In support of its petition Multi-State submitted an affidavit by Mr. Blaisdell which recites in pertinent part that Mr. Jones "castigated affiant" for requesting further documentation from the Bank at a meeting with

[1] Also before us is an application filed by RKO General, Inc. on July 29, 1974 for review of the Review Board's Memorandum Opinion and Order, 47 FCC 2d 827 (1974), which denied a request for additional issues against Multi-State; comments filed by the Broadcast Bureau on August 16, 1974; an opposition filed by Multi-State Communications, Inc. on August 17, 1974; and a reply filed by RKO General, Inc. on August 28, 1974. In light of our action herein, the application will be dismissed as moot.

two Bank employeees on March 1, 1973; that Mr. Jones thereafter "rebuffed" efforts by affiant to clarify the relationship between Multi-State and the Bank; and that efforts to discuss the Bank letter with Mr. Jones prior to the latter's testimony on October 3, 1974 were unsuccessful. Mr. Blaisdell further asserts that at the December 1, 1976 meeting, Mr. Jones acknowledged that he has been angry with affiant and Multi-State, and that affiant now understands why Mr. Jones testified "in almost contradictory fashion" concerning the Bank letter. The Bank is still willing to stand behind the letter, Multi-State asserts, and it argues that the Commission should therefore reconsider its Decision and remand the proceeding for further hearing. It states also that the request could not have been earlier filed because of Mr. Jones' refusal to meet with it.

4. Multi-State's request for reconsideration of our Decision must be rejected on both procedural and substantive grounds. Procedurally the petition is deficient in that it fails to establish that the facts now relied upon could not, with the exercise of ordinary diligence, earlier have been brought to the attention of the Commission as required by Section 1.106(c) of the Rules.[2] It is apparent from the affidavit of Mr. Blaisdell that the events now relied upon as the basis for reconsideration occurred prior to October 3, 1974 when Mr. Jones testified at the hearing. Furthermore, as pointed out by the Bureau, Mr. Jones' testimony was not significantly different from the views which he had expressed in his deposition taken on June 13, 1974. Manifestly, therefore, Multi-State was fully aware of Mr. Jones'

[2] Section 1.106(c) of our Rules, in part, states that a petition for reconsideration which relies on facts not previously presented to the Commission will only be granted: if the facts relied upon relate to changed circumstances that arose after the petitioner's last opportunity to present them; the facts relied on were not previously known and could not have been discovered with the exercise of ordinary diligence; or the Commission determines consideration of such facts is required in the public interest.

attitude toward it long before the December 1, 1976 meeting with the bank officials. Thus no newly discovered evidence within the contemplation of Section 1.106 has been submitted by Multi-State and it has advanced no such substantial public interest considerations which would justify a reopening for the adduction of evidence which could have or should have been submitted at an earlier stage of the proceeding. *United Broadcasting Company of Florida, Inc.*, 61 FCC 2d 970 (1976).

5. Moreover, Multi-State has not demonstrated any reasonable likelihood that the evidence it proposes to adduce at a reopened hearing would affect the outcome of this proceeding. Multi-State does not even claim that the Bank has repudiated Mr. Jones' testimony nor does it allege that the Bank has evaluated Multi-State's credit-worthiness and is now ready to make the loan. On the contrary, the evidence upon which we principally relied in reaching the determination that Multi-State is not financially qualified has in no way been discredited. Since our Decision was based on substantial and probative evidence of record and no sufficient reasons have been presented for disturbing that Decision, we conclude that Multi-State's petition must be denied.

6. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Multi-State Communications, Inc. on December 17, 1976 IS DENIED.

7. IT IS FURTHER ORDERED, That the application for review filed by RKO General, Inc. on July 29, 1974 IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX D

(61 F.C.C.2d 1070)

F.C.C. 74D-63

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of:

RKO GENERAL, INC. (WOR-TV), NEW YORK, NEW YORK
For Renewal of Broadcast License

Docket No. 19991
File No. BRCT-71

MULTI-STATE COMMUNICATIONS, INC., NEW YORK, NEW YORK
For Construction Permit for New Television Broadcast Station

Docket No. 19992
File No. BPCT-4527

Appearances

Thomas N. Dowd, James J. Freeman and *Leon J. Schachter* (Pierson, Ball & Dowd) on behalf of RKO General, Inc.; *Joseph M. Morrisey, Samuel M. Bradley, Michael S. Yaroschuk* and *Edward P. Morgan* (Welch & Morgan) on behalf of Multi-State Communications, Inc.; *Kaye H. Jones, Raymond A. Guenter, Albert N. Hutchinson* and *Gerald S. Armstrong* on behalf of Chase Manhattan Bank; and *Charles W. Kelley* and *Eric S. Kravitz* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

PARTIAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE CHESTER F. NAUMOWICZ, JR.

(Issued: December 13, 1974; Released: December 18, 1974.)

Preliminary Statement

1. This proceeding involves the application of RKO General, Inc. for renewal of its license for WOR-TV, New York, New York, and the mutually exclusive application of Multi-State Communications, Inc. for a new station employing the same facilities. By order released April 10, 1974 the Commission consolidated them for hearing on various issues including the following:

> "1. To determine with respect to the application of Multi-State Communications, Inc.:
>
> (f) The collateral, if any, for the $4,000,000 bank loan from the Chase Manhattan Bank, and whether the applicant can comply with the collateral requirements."[1]

2. The Commission noted in the Order of Designation that "Multi-State has established the availability of the $4,000,000 bank loan from the Chase Manhattan Bank." It based this statement on a letter dated April 18, 1972 from the Chase Manhattan Bank by its Vice President, Kaye Harding Jones, to Multi-State. The letter read as follows:

> "We are willing to lend you up to $4,000,000 provided the following conditions are met:
>
> (1) You are successful in obtaining approval from the Federal Communications Commission to construct and operate a television broadcast station on VHF Channel 9 in New York City; and,
>
> (2) All reasonable and ordinary credit criteria of the Chase Manhattan Bank are met at such time as you (a) have received the license to operate said station; and (b) request from the Chase Manhattan Bank a formal lending commitment.
>
> While the pricing and terms of amortization of any loan commitment will of course be contingent upon the exact credit conditions prevailing at the time of such commitment, we contemplate calculating interest on any loan made at the rate of 2% above the prime rate of this bank at the time of each advance (for information, the prime rate of this bank is presently 5%); and, any loan made will be repaid, after a one year moratorium on principal repayment as necessary, in eight equal semi-annual installments or as otherwise reasonable in line with financial projections received prior to the time of borrowing.
>
> This bank is personally and favorably acquainted with several of the stockholders listed in your application to the Federal Communications Commission. As a condition of our intent to finance Multi-State Communications, Inc., we are depending on the continued participation in your venture of substantially all of the stockholders named in your application or substitute stockholders which are acceptable to the Chase Manhattan Bank."

In the Order of Designation the Commission observed that the bank's letter did not mention collateral. Hence, it specified the issue quoted at paragraph 1, *supra.*

3. On June 13, 1974 RKO took the discovery deposition of Mr. Jones, who had signed the bank's letter, under the issue which had been designated as to collateral. On the basis of that deposition it petitioned for enlargement of the issues. By order released August 13, 1974, the Review Board added the following issue:

> "To determine whether Multi-State Communications, Inc. will have available a $4,000,000 loan to finance its construction and first three months' operating ex-

[1] Neither the issue quoted in the text above nor any of the other issues specified in the Order of Designation are to be resolved in this Partial Initial Decision. The issue is quoted only as part of the essential background of what is to be decided herein.

penses, and, in light thereof, whether Multi-State Communications, Inc. is financially qualified."

4. At a conference held on August 21, 1970 RKO suggested the possibility of a Summary Decision on the Multi-State financial issue. The presiding Judge indicated that he thought such a procedure inappropriate for the issue as a whole, but that he viewed the loan availability sub-issue as being so narrow and with a sufficiently great degree of possibility of being dispositive that it would be worthwhile to conduct hearing on it in advance of hearing on the rest of the issue. Accordingly, he directed that an accelerated hearing be conducted on the loan availability sub-issue.

5. Hearing on the sub-issue was conducted on October 3, 1974. On the basis of that hearing RKO moved for summary decision adverse to Multi-State. By order released November 13, 1974, the presiding Judge denied that motion, but called for Partial Proposed Findings of Fact and Conclusions of Law. Such pleadings were filed by the parties on December 3, 1974.

Findings of Fact

6. For reasons specified in the Order of Designation it is not possible to calculate exactly the sum that will be necessary for Multi-State to construct its station and operate for a period of three months. However, as indicated in the Order of Designation, at least $4,240,000 will be needed to meet these costs. Multi-State has proposed $302,000 in paid-in or subscribed capital,[2] and the $4,000,000 bank loan.

7. To prove the availability of the $4,000,000 bank loan, Multi-State relies on the bank's letter of April 18, 1972,

[2] Issues have been designated as to the availability of this capital. However, these issues have not been tried, and for the purposes of this Partial Initial Decision it will be assumed that all of the proposed capital is, in fact, available.

quoted at paragraph 2, *supra,* and upon the bank's more recent affirmations of that letter. The most recent such affirmation was at the hearing of October 3, 1974 at which in response to the question, "is this a viable, subsisting letter which Chase Manhattan now regards as outstanding to Multi-State Communications?" Mr. Jones answered, "Yes, sir."

8. However, Mr. Jones gave additional testimony which illuminated the extent to which the bank regards itself as committed.[3] Rather than attempting to paraphrase Mr. Jones' testimony these Findings of Fact will include quotations of all of that testimony which the presiding Judge regards as directly pertinent.

9. At T. 70 Jones was asked:

> "—let us assume that Multi-State should be successful in this proceeding, and let us assume that they received the grant from the Federal Communications Commission. Would Chase Manhattan be disposed to make this loan under the terms indicated in your letter?"

He responded:[4]

> "Would it be disposed? The Chase Manhattan Bank would certainly consider this as a proper loan request. We would examine it to determine whether the loan was credit worthy, ... But assuming a credit-worthy case is presented to us, yes, we still have a viable interest in proceeding."

[3] All parties are in agreement that the bank's letter does not constitute a legally binding, specifically enforceable contract.

[4] At T. 70, line 18 appears the symbol "Q" indicating that what follows is a question by the attorney examining. In fact, what follows is Mr. Jones' answer. On the motion of the presiding Judge, the transcript is corrected by substituting the symbol "A" for the symbol "Q" at T. 70, line 18.

10. At T. 77 Jones was asked:

> ". . . we asked the question [at the discovery deposition] whether upon the basis of that investigation [made by the bank at the time Multi-State contacted it about the loan] you had made any determination of whether or not Chase Manhattan would be willing to loan $4,000,000 to Multi-State . . . . And your answer was that you had not made such a determination."

Jones answered:

> "That is true."

He was then asked:

> "And have you made any such determination as of the present time?"

He replied:

> "No, sir."

11. At T. 78 Jones was asked:

> ". . . whether as of this time, Chase Manhattan or you as an officer of Chase Manhattan have received the information upon the basis of which you could give any reasonable assurance that when requested to do so, you would make a $4,000,000 loan to Multi-State."

He replied:

> "No, sir."

12. At T. 82-3, the following exchange is recorded:

> "Q. . . . Now does Chase give letters of intent with respect to a loan which are not legally binding commitments, but which indicate a present intention to make a loan and an indication that if conditions remain the same with respect to the financial worth of

> the participants and so forth, that the loan would be made in the future? . . . ."
>
> "A. A letter of intent to make a loan in the future, yes, sir."
>
> "Q. . . . Multi-State Exhibit #1 [the April 18, 1972 bank letter] is not a representation of an intention to make the loan based upon the continuation or the existence of the facts as you know them, or you knew them at the time you wrote the letter?"
>
> "A. No, sir, the time that we are looking forward to consider it is the time that these conditions are operative [at such time as the FCC may have awarded Multi-State a grant]."
>
> "Q. And, until such time as these conditions become operative, you had made no evaluation as to the creditworthiness of Multi-State?"
>
> "A. That is correct."

13. At T. 84 Jones was asked:

> ". . . Mr. Jones, is it not true that there must be some further action by the bank on information to be received from Multi-State before you can state with any reasonable assurance that Multi-State will have available a four million dollar loan from the Chase Manhattan Bank?"

He replied:

> "Yes."

He was then asked:

> "Now, assuming that Multi-State were today to receive the license to operate Channel 9 in New York, without the information provided by Multi-State from the sort that you've described previously, you could not even

today then, state with reasonable assurance that the Chase Manhattan Bank would be willing to make a four million dollar loan, is that not correct?"

Jones responded:

"That is correct. We would first have to determine the credit-worthiness . . . ."

He was then asked:

"The mere fact that Multi-State had received from this Commission the license to operate Channel 9 in New York, doesn't guarantee Multi-State's credit worthiness in your opinion, does it?"

Jones answered:

"No, sir."

14. At T. 87 Mr. Jones was asked:

"Q. Now we also asked the question at the time of your [discovery] deposition was to the effect that you had seen certain balance sheets of certain stockholders, and you had made an examination. Now, do you recall that—and the question was asked, as to whether you had made any evaluation upon the basis of that information which would enable you to state whether or not the loan would be made to Multi-State upon the basis of that financial information? Do you recall—the financial statements submitted by Multi-State and its stockholders?"

"A. And, I said, no, sir."

"Q. And, you have made no determination that those statements would in fact support such a loan?"

"A. That is correct, sir."

15. At page 90, Jones was asked:

"Q. And as I understand that determination [upon which a judgment could be made as to whether Multi-State meets the 'reasonable and ordinary credit criteria' referred to in the bank's letter of April 18, 1972] had not been made as of April 18, 1972?

"A. Yes, sir."

"Q. And I further understand that that determination had not been made as of the present time?

"A. Yes, sir."

"Q. And that you have not received any of the information upon which such an estimate or an analysis could be made?"

"A. Yes, sir."[5]

16. Finally, at T. 91 Mr. Jones was asked:

"Q. Mr. Jones . . . would you not be interested in making any legal loan to a financially sound and creditworthy customer, who has met all the reasonable and ordinary credit criteria, especially if such a loan were to be made at an interest rate, 2% above prime? I mean, isn't this what banks are in business to do?

"A. Yes, sir."

"Q. So, what you really have told Multi-State is that if they are, in fact, a financially sound and creditworthy customer, and they have met all the reasonable and ordinary credit criteria, and they are willing to

---

[5] In the written quotations at paragraph 15 the witness' affirmative answers may appear somewhat ambiguous. However, the inflections of his voice, and in the context of his testimony as a whole, render it apparent that he was saying that he had not received the information upon which a determination as to creditworthiness would be based.

pay an interest rate 2% above prime, that the Chase Manhattan Bank will be interested in making a loan to them?''

''A. We would be interested in, unless there are severe conditions that might dictate otherwise . . . .''

17. It is found that the testimony of Mr. Jones quoted at paragraphs 9-16, *supra,* represents the actual intention of the Chase Manhattan Bank with respect to the loan proposed by Multi-State.

Conclusions

18. Multi-State's proposed bank loan is not now in the form of a legally binding commitment. However, this fact is not decisionally significant, for the Commission does not require that applicants obtain specifically enforceable loan commitments. Rather, an applicant is obligated to prove that there is ''reasonable assurance'' that the bank actually intends to make the loan, *Jay Sadow,* 39 FCC 2d 808.

19. What constitutes ''reasonable assurance'' varies according to the circumstances. Traditionally, the Commission has accepted letters from banks indicating that the bank has satisfied itself that it is willing to make the loan upon specified terms. Indeed, if circumstances do not raise some question as to how thoroughly the bank has satisfied itself as to the desirability of making the loan, such letters are accepted without requiring the presentation of a bank official to sponsor the letter, *Jay Sadow, supra.* However, when a question does arise as to whether the bank has actually determined that it stands ready to make the loan absent some adverse change in conditions, the Commission conducts a more detailed examination of the matter, *Chicagoland TV Co.,* 11 FCC 2d 96.

20. In this case the Chase Bank's letter of April 18, 1972 was initially accepted by the Commission as indicating a present firm intention to make the loan. Its statement that

''we are willing to lend you up to $4,000,000'' was accepted as controlling, and the proviso that ''all reasonable and ordinary credit criteria'' must be met was taken as a *pro forma* reservation in the event of an adverse change in circumstances. However, the June 13, 1974 discovery deposition of the signatory of the bank's letter indicated that the proviso might be of more substantial import.

21. Mr. Jones' testimony at the hearing establishes that the proviso is, and always has been, of controlling significance. Plainly, the bank has never regarded itself as being legally, morally, or as a matter of business practice committed in any way to making the loan. The most that can be said is that certain of the Multi-State shareholders are known favorably by the bank, and, on that basis, the bank would entertain a future application for a loan with interest.

22. Before the bank would commit itself it would require Multi-State and its principals to submit certain financial information. That information has not only not been submitted, so far as the record shows its detailed nature has not even been discussed between Multi-State and the bank. The showing here is analagous to, but even weaker, than that which was found insufficient in *Chicagoland, supra.* There the bank deemed itself as committed to the loan provided the value of the certain specified collateral was proven to it to be as represented by the proposed borrower. Here, the bank feels no degree of commitment whatsoever, and believes it has only expressed interest in a future loan application.

23. It is concluded that Multi-State has failed to carry its burden of proving that there is reasonable assurance that its proposed bank loan is available. To the contrary, this record affirmatively proves that there is absolutely no ground for any belief by either Multi-State or the Commission that there is any assurance, reasonable or otherwise, that the loan will actually be made.

24. To construct and operate its proposed station Multi-State will require over $4,000,000. Absent the bank loan, its total resources are only some $300,000. Its shortfall exceeds three and one half million dollars. It is concluded that the applicant is not financially qualified to construct and operate its proposed station.

25. The procedural consequences of the conclusion reached at paragraph 24, *supra,* remain to be considered. Ordinary practice would dictate that hearing be conducted on the remaining issues, and that the foregoing Findings and Conclusions be incorporated into an Initial Decision considering all of the evidence on all of the issues. However, for reasons stated by the presiding Judge at the conference of August 21, 1974, and in Orders released November 13, 1974 and December 10, 1974, this proceeding seems unsuitable for ordinary practice. Recognizing that subordinate adjudicatory authority can never be entirely certain that its judgment will be sustained on review, what appears to the presiding Judge to be a massive weight of evidence supporting his decision and a total lack of countervailing evidence persuades him that this is one of those rare cases where the public interest would be best served by issuing a Partial Initial Decision disqualifying an applicant on the basis of a record confined to only one of several designated issues.[6]

26. Hence, Multi-State having failed to establish that it is financially qualified to construct and operate its proposed station, it is concluded that the public interest would not be served by a grant of its application.

[6] While this is not a Summary Decision, the adoption of Rule 1.251 suggests that in appropriate circumstances the Commission now contemplates the termination of hearings by summary decision of dispositive issues. Since certain such decisions may involve the disqualification of an applicant upon consideration of only one of several designated issues, the procedures here adopted would seem to be fairly analagous.

Accordingly, IT IS ORDERED, That unless an appeal from this Partial Initial Decision is taken by a party, or the Commission reviews the Partial Initial Decision on its own motion pursuant to Rule 1.276,[7] the application of Multi-State Communications, Inc. IS DENIED; and

IT IS FURTHER ORDERED, That, pending final action by the Commission on this Partial Initial Decision, further proceedings on the application of RKO General, Inc. ARE SUSPENDED.

CHESTER F. NAUMOWICZ, JR.
Administrative Law Judge
FEDERAL COMMUNICATIONS COMMISSION

[7] Under Rule 1.276 appeals in the form of exceptions to the Initial Decision must be filed within 30 days of the public release date of the full text hereof, unless an extension of time is duly granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50 day period, or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

APPENDIX E

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151 *et seq.*

§ 307. Licenses; allocation of facilities; terms; renewals.

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

• • • •

§ 308. Same; application; conditions and restrictions in license for foreign communication.

• • •

(b) All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

• • • •

§ 309. Application for license—Considerations in granting application.

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * * *

Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.*

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1089

RKO GENERAL, INC.,

Petitioner,

v.

MULTI-STATE COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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February 8, 1979

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It appears as Appendix A in the Petition for Writ of Certiorari. The opinion of the Federal Communications Commission is reported at 61 F.C.C.2d 1062 (1976), and appears as Appendix B in the Petition. The Commission's decision denying reconsideration is reported at 64 F.C.C.2d 869 (1977), and appears as Appendix C in the Petition. The Partial Initial Decision

of the Administrative Law Judge is reported at 61 F.C.C.2d 1070 (1974), and appears as Appendix D in the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1978. A petition for rehearing and suggestion for rehearing *en banc* by Petitioner was denied on November 30, 1978. The jurisdiction of this Court has been invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals properly exercised its function of judicial review of an administrative action (1) in determining that a bank letter provided "reasonable assurance" under Federal Communications Commission case law and policy that an application for a permit to construct a television station had the requisite financing, and (2) by remanding the case to the Federal Communications Commission for further proceedings in light of that determination.

STATUTES INVOLVED

Sections 307(a), 308(b), and 309(a) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § § 307(a), 308(b), 309(a), and Section 10 of the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. § 706. These statutes appear as Appendix E to the Petition.

STATEMENT OF THE CASE

On May 1, 1972, Respondent, Multi-State Communications, Inc. ("Multi-State"), filed an application with the Federal Communications Commission ("Commis-

sion") for a permit to construct a television station on Channel 9, New York City. This application was mutually exclusive with the license renewal application for Station WOR-TV on the same channel, filed by Petitioner, RKO General, Inc. ("RKO").

To satisfy the Commission's requirement that an applicant for a new television station demonstrate with "reasonable assurance" that it is financially able to construct and operate the station, Respondent included in its application a letter from the Chase Manhattan Bank ("Chase"), signed by Mr. Kaye Jones, a bank official. In its letter the bank stated that it was willing to lend Respondent up to $4,000,000.00 provided primarily that Respondent's application was approved by the Commission and once such approval had been received, that Respondent meet all the ordinary and reasonable credit criteria of Chase and would request, at that time, a formal lending commitment. The bank also noted in the letter that it is personally and favorably acquainted with several of Respondent's stockholders and, as a condition of its intent to finance Respondent, that it was depending on the continued participation of substantially all of the stockholders named in the Respondent's application or substitute stockholders acceptable to Chase.

The bank letter to Respondent was accepted by the Commission as satisfying the "reasonable assurance" requirement that an applicant be financially qualified to construct and operate a broadcast station. This acceptance was subject to a hearing on Respondent's ability to meet any collateral requirement if there were such a requirement. As a result of a deposition taken by Petitioner of Jones, the Chase official who had signed the letter, an issue was designated in the case to determine

the general availability of the Chase $4,000,000.00 loan to Respondent.

A hearing on this issue was held before an Administrative Law Judge ("ALJ"). Jones testified that Chase did not consider the letter a final and binding commitment.[1] He also testified that the bank stood upon the letter as written and that the conditions written into the letter only became operative after the grant of Respondent's application by the Commission. Jones testified that any additional information on Respondent would not be required until Respondent requested the loan after grant of the application of Respondent. As part of his testimony Jones acknowledged that the expression of willingness and intent to lend the money to Respondent was ". . . a still subsisting position of Chase Manhattan Bank."

The Administrative Law Judge in his Partial Initial Decision acknowledged that the Commission accepted the Chase bank letter as constituting "reasonable assurance" that the money would be available to Respondent, but that the testimony of Jones indicated that Respondent had failed to demonstrate the requisite degree of "reasonable assurance" that the bank loan would be available. Based on that testimony the Administrative Law Judge found Respondent financially disqualified.

Respondent appealed to the Commission which upheld the decision of the Administrative Law Judge. Respondent's petition for reconsideration was denied by the Commission.

Petitioner's application for renewal was granted subject to the resolution of issues designated against it in the

[1] A binding commitment is not required by the Commission. "Reasonable assurance" that the loan will be available is all that is required.

Order designating for hearing the application of Petitioner and Respondent. The designated issues relate to alleged anticompetitive practices, violation of the sponsorship identification provisions of Section 317 of the Communications Act of 1934, as amended, and allegations of misrepresentation of facts, concealment of facts and lack of candor on the part of officers, employees and/or former employees during the course of another Federal Communications Commission proceeding.

Respondent appealed to the United States Court of Appeals for the District of Columbia Circuit with Petitioner participating as Intervenor. After the filing of briefs, oral argument and a review of the transcript of the entire testimony of Jones,[2] the Court of Appeals reversed the Commission, stating that the record evidence did not support the Commission's holding that Respondent had failed to establish its financial qualifications to be a licensee and that the bank letter satisfied the Commission's requirement of "reasonable assurance" that the loan would be available. Accordingly, the court below ruled that the bank letter complied with the Commission's own standard. The court remanded the case to the Commission on that basis. Petitioner, RKO, as Intervenor, petitioned for rehearing in the court below and suggested rehearing *en banc* which was denied by the court. Appellee below, Federal Communications Commission, did not request rehearing or suggest rehearing *en banc*.

[2] On July 10, 1978, the Clerk of the Court of Appeals requested and received on July 12 from the Commission copies of the transcript in the proceedings including (Vol. 4), the entire testimony of the bank official. See Appendix A.

ARGUMENT

The petition in this case presents an administrative law case in which the Court of Appeals applied the proper standard of judicial review and there is no occasion for further review by this Court. Petitioner is proceeding in this case on a false premise; namely, that the Court of Appeals substituted its own evaluation of the evidence in the case for the evaluation of the Federal Communications Commission. As clearly shown, the court having reviewed the entire record pursuant to the applicable requirements of the Administrative Procedure Act, 5 U.S.C. Section 706, was unable to find the requisite evidence necessary to support the "substantial evidence" requirement of the Administrative Procedure Act and therefore reversed the Federal Communications Commission.

Petitioner contends (page 6), that in the decision below the court has disregarded the limitations on judicial review of administrative agencies established by the Administrative Procedure Act and previous decisions of this Court. It contends that the court committed the same interventionist errors present in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). What Petitioner fails to comprehend is that its so-called limitations on judicial review are not applicable in the instant case. It has overlooked the fact that in both of the cases cited above the primary matter of concern to the court was rulemaking procedures of Government agencies. In such agency rulemaking cases a different standard is applied as this Court cogently noted in *FCC v. National Citizens Commission for Broadcasting, supra*, wherein it stated (at pp. 801-803):

> "We agree with the Court of Appeals that regulations promulgated after informal rulemaking, while not subject to review under the 'substantial evidence' test of the APA, 5 U.S.C. § 706(2)(E), quoted in n. 21, *supra*, may be invalidated by a reviewing court under the 'arbitrary or capricious' standard if they are not rational and based on consideration of the relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-416, S.Ct. 814, 822-823, 28 L.Ed.2d 136 (1971)."

In the instant case, as shown below, the court correctly applied the "substantial evidence" test to be utilized in adjudicatory matters and as a result of the application of this test properly reversed the Commission.

In reaching its decision the Appeals Court carefully observed the requirements of the Administrative Procedure Act, 5 U.S.C. § 706(2)(E), applicable to this type of case. The court likewise adhered to the mandate of this Court delineated in its decisions in cases properly applicable to a case of this type. [See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), and *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. ___, 98 S.Ct. 3463 (1978)].

The error in Petitioner's interpretation of the reviewing court's action is obvious. As stated above, its argument is based solely on its claim that the court substituted its evaluation of the evidence for that of the Commission. Quite the contrary. As required by the applicable provisions of the Administrative Procedures Act and the mandate of this Court, as delineated in relevant cases, the court below, in applying the required "substantial evidence" test, canvassed the record to determine whether the evidence relied on by the Commission provided the

substantial support required for the Commission's decision. It was unable to find this required "substantial evidence." As noted in its Opinion (Petitioner's Appendix 5a):

> "After carefully scrutinizing Jones' testimony and the remainder of the evidence, we are of the opinion that the record evidence does not support the Commission's holding that Multi-State failed to establish its financial qualifications to be a licensee."

The correct procedure to be followed by the reviewing courts in cases such as this was clearly spelled out by this Court in *Universal Camera Corp. v. N.L.R.B., supra*, and recently reiterated in the latest of its progeny, *Beth Israel Hospital v. N.L.R.B., supra.* In *Universal Camera Corp. v. N.L.R.B., supra*, this Court went to great lengths in tracing the Congressional intent and the legislative history of the Administrative Procedures Act as it applies to the scope of judicial review. It pointed out that the Court of Appeals was not completely bound by decisions of Federal agencies. The intent of Congress was made quite clear as to the scope of review required by the Court of Appeals in dealing with the review of decisions of Federal agencies such as the National Labor Relations Board. It noted (at 466):

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside

> when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

In the instant case the Court of Appeals properly exercised its conventional judicial function. It took the affirmative action required by both the Administrative Procedures Act and the decisions of this Court. While affording full respect to the Commission's findings, it reviewed the entire record and found lacking the substantial evidence necessary to support the Commission's findings. It could do no less than reverse the Commission on this record. Simply stated, the court reviewed the Chase bank letter and the testimony of Jones in its entirety. The court could not find the substantial evidence necessary to support the Commission's findings that the Chase letter did not satisfy the Commission's requirements for such letters.

For these reasons, which are stated in its Opinion, the court remanded the case to the Commission with the instructions that Respondent cannot be regarded as disqualified for financial reasons on the basis of the bank letter. Petitioner attempts to stretch these instructions into something more. On pages 12-13 of its Petition, it incorrectly states:

> "In ruling that the Commission must hold that the loan would be available to Multi-State notwithstanding the bank's reservations, the court of appeals in effect has forbidden the Commission from requiring applicants to demonstrate their financial qualifications prior to receiving a construction permit."

This simply is not the case. In its opinion, the Court of Appeals merely stated that Respondent's letter satisfied the requirements of previous Commission policy and case law on the sufficiency of such letters. Contrary to Petitioner's claim, the court has not usurped the authority of the Commission granted by Congress in determining the financial qualifications of its applicants. The Communications Act of 1934, as amended, Section 307(a), 308(b) and 309(a) has not been disturbed by the ruling of the Court of Appeals.

Accordingly, there is no occasion for this Court to grant the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD P. MORGAN
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900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 296-5151
Attorney for Respondent

February 8, 1979

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001

July 10, 1978

Thomas R. King, Jr., Esquire
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Appeal No. 77-1400—*Multi-State Communications, Inc. v. FCC*

Dear Mr. King:

Confirming our telephone conversation today, it will be appreciated if you would arrange for the delivery to the Court of a transcript of the proceedings in this case before the administrative law judge. It is hoped that this transcript can be delivered to the Court within the next day or so.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ George A. Fisher
Clerk

GAF/plk

cc: Joseph M. Morrisey, Esquire
Harold D. Cohen, Esquire

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001

July 12, 1978

Thomas R. King, Jr., Esquire
Office of the General Counsel
FEderal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Appeal No. 77-1440—*Multi-State Communications, Inc. v. FCC*

Dear Mr. King:

The purpose of this letter is to acknowledge receipt of certain documents which you delivered to my office today in response to my request made on July 10. The documents received today are as follows:

(1) Undesignated volume in Docket No. 19992
(2) Vol. 2 in Docket No. 19992
(3) Vol. 4 in Docket No. 19991
(4) Vol. 5 " " " "
(5) Vol. 6 " " " "
(6) Vol. 7 " " " "

It is my understanding that the transcript of the proceedings before the A.L.J. begin in volume 4 and continue through volume 7, totalling 129 pages.

Thank you for your assistance in this matter.

Very truly yours,

/s/ George A. Fisher
Clerk

GAF/plk

cc: Joseph Morrissey, Esquire
Harold D. Cohen, Esquire

No. 78-1089

In the Supreme Court of the United States

OCTOBER TERM, 1978

RKO GENERAL, INC., PETITIONER

v.

MULTI-STATE COMMUNICATIONS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1089

RKO GENERAL, INC., PETITIONER

v.

MULTI-STATE COMMUNICATIONS, INC., ET AL.

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1. This case involves a television licensing proceeding commenced by the Federal Communications Commission in 1974. The two applicants in the proceeding had filed mutually exclusive applications to operate a television station in New York City. Petitioner RKO General, the current licensee, sought renewal of its license. Respondent Multi-State Communications, Inc., sought a construction permit to build and operate a new station. Because the applications were mutually exclusive, the Commission designated them for a comparative hearing to determine which would best serve the public interest. Multi-State claimed that it had reasonable assurance of receiving a $4 million loan from Chase Manhattan Bank to cover its construction and initial operating costs. After the deposition testimony of the bank's vice president raised doubts on this point, the Commission directed that

evidence be adduced relating to the bank loan commitment which formed the basis of Multi-State's financial showing (Pet. App. 2d-4d).

After hearings on the financial issue, the Administrative Law Judge issued a partial initial decision concluding that "this record affirmatively proves that there is absolutely no ground for any belief by either Multi-State or the Commission that there is any assurance, reasonable or otherwise, that the loan will actually be made" (Pet. App. 11d). The Administrative Law Judge acknowledged that when an applicant bases its showing of financial ability to construct and operate a station on a bank loan commitment, the Commission does not require a legally binding commitment. "Rather, an applicant is obligated to prove that there is 'reasonable assurance' that the bank actually intends to make the loan" (Pet. App. 10d). The Administrative Law Judge nonetheless determined, on the basis of the bank officials' testimony at the hearing, that "the bank feels no degree of commitment whatsoever, and believes it has only expressed interest in a future loan application" (Pet. App. 11a).[1]

On review of the partial initial decision, the Commission agreed with the Administrative Law Judge that Multi-State had no reasonable assurance of receiving a loan, and therefore was not financially qualified to construct and operate the proposed station (Pet. App. 1b, 6b-7b):

> [W]e are persuaded, in agreement with the ALJ, that no reasonable assurance of the availability of a $4,000,000 loan has been demonstrated * * *. The testimony of Mr. Jones [an official of the bank] establishes that neither at the time of the issuance of the bank letter nor at the time of the hearing [has] Chase Manhattan made a determination that the loan would be made * * *.

[1] At the hearing, a bank official was asked, "whether as of this time, Chase Manhattan or you as an officer of Chase Manhattan have received the information upon the basis of which you could give any reasonable assurance that when requested to do so, you would make a $4,000,000 loan to Multi-State." The bank official responded, "No, sir" (Pet. App. 6d; see generally, Pet. App. 4d-10d).

The court of appeals reversed and remanded for further proceedings in which Multi-State will not be disqualified because of the unavailability of the bank loan. The Court concluded that the record evidence does not support the Commission's holding that Multi-State failed to establish its financial qualifications (Pet. App. 1a, 5a). The Court stated that the testimony of the bank officer at the hearing did not supersede the bank loan letter, which indicated a present firm intention to make a loan (Pet. App. 6a-7a).

2. The court of appeals erroneously substituted its judgment on the weight of the evidence for that of the Commission. The error is not sufficiently important, however, to merit review by this Court.

Sections 308(b) and 309(a) of the Communications Act, 47 U.S.C. 308(b) and 309(a), require the Commission to assess the adequacy of an applicant's financial qualifications before granting a station license application. See *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). Congress delegated authority to the Commission to devise standards to measure financial qualifications under this statutory mandate.

The Commission permits applicants to rely on promised bank loans to demonstrate financial eligibility when they have a "reasonable assurance" that the loans will be available at the proper time. See, *e.g.*, *Crosby N. Boyd (Washington Star)*, 57 FCC 2d 475, 487-490 (1976). In the present case, although the Commission initially determined that the bank loan letter submitted by Multi-State met this standard, further consideration led the

Commission to conclude that it had misunderstood the meaning of the letter, and that the letter did not constitute a "reasonable assurance" that the loan would be granted.

The court of appeals should have deferred to the Commission's evidentiary determination here. By substituting its own judgment for the Commission's, the court violated the well-established principle that it is for the agency, not the reviewing court, to weigh and interpret the evidence. See *Ralston Purina Co.* v. *Lousiville & Nashville R. Co.*, 426 U.S. 476 (1976); see also *FCC* v. *National Citizens Commission for Broadcasting*, 436 U.S. 775 (1978). Nonetheless, the court of appeals did not substantially undermine any Commission policy. Its reversal of the Commission's finding on a limited evidentiary issue in this case, though erroneous, is not important enough to call for this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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